

RECENT FEDERAL AND LOCAL LEGISLATION*

NEW FRASIER-LEMKE FARM RELIEF ACT

ON MAY 27, 1935, in *Louisville Joint Stock Land Bank v. Radford*,¹ the United States Supreme Court held unconstitutional as violating the due process clause of the Fifth Amendment subsection s of section 75 of the Bankruptcy Act, the first Frasier-Lemke Farm Relief Act. On August 28th, 1935, a new subsection s was approved,² obviously designed to remedy the principal features of the original Act which the Supreme Court had criticized.

The most striking of these features was the provision permitting the farmer to retain his farm free from the entire mortgage upon the payment of its appraised value, though less than the amount of the mortgage debt. This provision had been a principal object of criticism in Mr. Justice Brandeis' opinion in the *Radford* case. The new act contains similar provisions,³ but emasculates them with the proviso "That upon request in writing by any secured creditor or creditors the court shall order the property upon which secured creditors have a lien to be sold at public auction."⁴ The mortgagee's power to bid at such auction and to use the mortgage debt in payment of his bid⁵ makes it possible for him to take over the property rather than to accept an amount less than the total indebtedness. This provision for an auction sale is coupled with a ninety-day redemption provision similar to the Illinois redemption statute⁶ in that the farmer may redeem by paying the sale price plus interest.

The proviso just discussed removes the "scaling down" feature of the original act⁷ and leaves the act, so far as its compulsory operation is con-

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¹ 295 U.S. 555, 55 Sup. Ct. 854 (1935).

² P. L. No. 384, 74th Cong., 1st sess.

³ Where formerly it was provided that the "fair and reasonable value" referred to was "not necessarily the market value at the time of such appraisal" (par. 1), the property is now required to be appraised "at its then fair and reasonable market value" (introductory paragraph of subsec. s).

⁴ Par. 3.

⁵ Except, of course, to the extent of expenses of the sale, etc.

⁶ Ill. Rev. Stat. 1935, c. 77, § 18.

⁷ The new act also provides that the possession continued in the debtor shall be "subject to all existing mortgages, liens, pledges, or incumbrances." Par. 1.

cerned, a moratory measure.⁸ The moratory features, furthermore, are now less drastic than under the original Frasier-Lemke Act. Where the original act provided for a five-year stay the present act substitutes three years, and the emergency clause provides that "if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for."⁹ As before, the farmer may remain in possession upon paying a "reasonable rental,"¹⁰ but

the court, in its discretion, if it deems it necessary to protect the creditors from loss . . . , and/or to secure the security, . . . may, in addition to the rental, require payments on the principal . . . , quarterly, semiannually, or annually, not inconsistent with the protection of the rights of creditors and the debtor's ability to pay, with a view to his financial rehabilitation.¹¹

All of these provisions show a study on the part of the draftsmen not only of the opinion in the *Radford* case but also of the decisions with respect to state mortgage moratoria.¹² While the latter cases were decided under the impairment of contracts clause,¹³ and while the federal government in the exercise of its bankruptcy power may, of course, impair contractual obligations, there are indications in the *Radford* opinion that the considerations determining whether bankruptcy legislation not only impairs the obligation of contracts but is so arbitrary as to violate the Fifth Amendment are, perhaps paradoxically, similar to the considerations determining whether a state moratory measure so drastically affects remedies as to constitute an impairment of obligation.¹⁴

W. G. K.

⁸ In *Continental Ill. Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry.*, 55 Sup. Ct. 595 (1935), temporary injunctive relief against the sale of security pledged by the debtor was sustained.

⁹ Par. 6. One district judge has intimated that this provision is unconstitutional for want of territorial uniformity. *In re Slaughter*, C. C. H. Bankr. Service, par. 3621 (N.D. Tex., Oct. 12, 1935).

¹⁰ It is provided that "the amount and kind of such rental (is) to be the usual customary rental in the community . . . based upon the rental value, net income, and earning capacity of the property." Par. 2.

¹¹ Par. 2.

¹² *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 Sup. Ct. 231 (1934); *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 54 Sup. Ct. 816 (1934); *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 Sup. Ct. 555 (1935).

¹³ U.S. Const., Art. I, § 10.

¹⁴ *In re Young*, C. C. H. Bankr. Service, par. 3658 (S.D. Ill., Oct. 21, 1935). The Circuit Court of Appeals for the Seventh Circuit, however, has recently held the amended subsection unconstitutional, on the ground that the bankruptcy power cannot affect "property rights," at least after a foreclosure judgment. *In re Lowman*, C. C. H. Bankr. Service, par. 3680 (C. C. A. 7th., Nov. 15, 1935). *Accord: In re Young, id.*, par. 3658 (S.D. Ill., Oct. 21, 1935). *Contra: In re Slaughter, supra* note 9.

AMENDMENTS TO RAILROAD REORGANIZATION ACT

Section 77 of the Bankruptcy Act, the railroad reorganization act, enacted during the last days of the Hoover administration, became the subject of considerable criticism, particularly by writers attacking the control of reorganizations by investment bankers and railroad officials.¹ Many of these criticisms were heeded in the elaborate revision of Section 77, approved August 27, 1935.² Recommendations for such a revision had been presented to Congress by the Federal Coordinator of Railroads, Joseph B. Eastman. A number of important changes are introduced and the revision is of interest to the reorganization bar not only because of the importance of railroad reorganizations but because of the possibility that some of the new features may later be introduced in Section 77B, applicable to the reorganization of corporations generally.

Section 77 formerly left the appointment of a trustee or trustees to the discretion of the judge, and required that if any be appointed it be from a panel previously selected by the Interstate Commerce Commission.³ The appointment of one or more trustees is now mandatory and is made subject to ratification by the commission.⁴ Judge Wilkerson, of the District Court for the Northern District of Illinois, is reported to have questioned the validity of this latter provision.⁵ The amendment also provides that if a trustee is appointed who within one year has been an officer, director, or employee of the railroad the judge must appoint another trustee without such affiliation.⁶ The new act provides that the judge shall direct the trustee to report to him any facts concerning fraud, mismanagement, etc., as a consequence of which the railroad may have a cause of action for damages.⁷ This provision recalls Lowenthal's bitter attack upon the friendly character of the 1925 reorganization of the Milwaukee road as having whitewashed the previous management.⁸

A new provision is inserted, making the process of the federal courts run throughout the country and requiring the United States Supreme

¹ See especially Lowenthal, *The Railroad Reorganization Act*, 47 Harv. L. Rev. 18 (1933); Weiner, *Reorganization under Section 77: A Comment*, 33 Col. L. Rev. 834 (1933).

² P. L. no. 381, 74th Cong. 1st Sess.

³ Subsec. (c).

⁴ Subsec. (c)(1).

⁵ *Chicago Herald & Examiner*, Sept. 25, 1935.

⁶ In appointing a trustee for the Chicago & Northwestern Railroad Co., Judge Barnes, of the District Court for the Northern District of Illinois, is reported to have voiced regrets that Section 77 required the appointment of a trustee, and that since he preferred not to appoint more than one trustee in order to minimize delays and expense, he was led to appoint a trustee with no prior connection with the railroad. *Chicago Herald & Examiner*, Oct. 2, 1935.

⁷ Subsec. (c)(9).

⁸ See Lowenthal, *The Investor Pays* (1933).

Court to promulgate rules relating to service of process as well as other rules under the section.⁹

On the important strategic question of access to lists of security holders, while the prior act required the railroad or its trustee to file lists of creditors and shareholders,¹⁰ doubts had arisen as to the power of the court to require the production of lists in the possession of others, notably investment banking houses and protective committees. Express provision has been inserted vesting such power in the court.¹¹

Important changes are introduced as to the time and manner of the submission of reorganization plans. Formerly the submission was to be made after the Interstate Commerce Commission had held a hearing and approved the plan, but before consideration of the plan by the court.¹² Now the submission is to be made only after the court has approved the plan.¹³ This provision was undoubtedly prepared with a view to promoting more thorough and independent consideration of the plan by the judge, requiring him to pass upon the plan before there have been marshalled behind it the votes of substantial majorities. The prior approval by the court as well as by the Interstate Commerce Commission should prove of substantial aid in securing promptly the necessary assents. Submission of the plan to security holders is now to be made by the commission, and the commission is given elaborate jurisdiction over protective committees and the solicitation of deposits, proxies, and assents.¹⁴ The commission is authorized to make such rules and regulations in this connection "as it deems necessary or desirable to promote the public interest and to insure proper practices in the representation of creditors and stockholders."

What doubt has arisen as to the proper classification of claims for purposes of voting on plans will hardly be removed by the new provision to the effect that the court "shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests."¹⁵ Trustees under bond indentures are expressly authorized to file claims on behalf of the holders of bonds, but authority to vote in their behalf on reorganization plans is expressly negated.¹⁶

Where formerly holders of two-thirds of all claims of each class and holders of two-thirds of all shares of each class were required to assent

⁹ Subsec. (a).

¹⁰ Subsec. (c).

¹¹ Subsec. (c)(5).

¹² Subsec. (d).

¹³ Subsec. (e). This change is in line with a criticism of the previous act voiced in Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 Va. L. Rev. 698, 715 (1933).

¹⁴ Subsec. (p).

¹⁵ Subsec. (c)(7).

¹⁶ *Ibid.*

before the plan might be confirmed,¹⁷ it is now provided that two-thirds of those of each class who vote is sufficient.¹⁸ Furthermore, the act authorizes the judge to confirm the plan even if it has not been so accepted if he finds

that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; (and) that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts;

The new provisions incorporating criteria for the determination of sound and fair reorganization plans seem to be of little help. It is provided that a plan must provide "adequate coverage" for fixed charges, after due consideration of the "probable prospective earnings of the property in the light of its earnings experience and all other relevant facts."¹⁹ Fears as to the effect in reorganization cases of valuations by the commission under the Interstate Commerce Act apparently inspired the provision that any valuation necessary in connection with the reorganization plan shall be on a basis which will give due consideration to the earning power of the property, past, present, and prospective. . . . In determining such value only such effect shall be given to the present cost of reproduction . . . and the original cost of the property . . . , as may be required under the law of the land, in light of its earning power and all other relevant facts.²⁰

Students of reorganization who have struggled with the problem of *Northern Pacific Ry. v. Boyd*²¹ will find little comfort in the new provision that the judge must be satisfied that the plan "will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."²²

W. G. K.

THE OIL COMPACT

The Illinois legislature by an act approved July 10, 1935, made the state a party to the Interstate Compact to Conserve Oil and Gas. Each state, by becoming a party to the compact, agrees to enact specified measures for the conservation of oil and gas. Each state, furthermore, is to appoint one representative to the Interstate Oil Compact Commission, which may by vote of the majority in number and producing interest of the states, recommend further conservation measures to the states. It is recited that the purpose of the compact is not to authorize the states which become

¹⁷ In the absence of certain types of provisions for dissenting classes. Subsecs. (e) and (g).

¹⁸ Subsec. (e).

¹⁹ Subsec. (b)(4).

²⁰ Subsec. (e).

²¹ 228 U.S. 482, 33 Sup. Ct. 554 (1913).

²² Subsec. (e).

parties to it, to limit production for the purpose of "stabilizing" prices, creating a "monopoly," or promoting "regimentation."

The Illinois act provides that the state's ratification shall become effective, and the compact provides that it shall become effective, when and only when three of the states of Texas, Oklahoma, California, Kansas, and New Mexico have ratified, and Congress has given its consent. After ratification by Texas, Oklahoma, Kansas, New Mexico, Colorado and Illinois, and consent by Congress, the President signed the Act of Congress giving consent on August 24, 1935. A commission has since been organized, with Gov. Marland of Oklahoma, one of the first supporters of the compact, as chairman.

Both the terms of the legislation and the statements of Gov. Marland and other supporters of the compact have expressed the limited purpose which those who have promoted the compact have in mind. California has as yet not ratified the compact; and conditions in California have also led California producers to adopt a policy which threatens the interests of those members of the industry who are seeking commercial stability, as well as conservation. These circumstances are a reminder of the obvious practical difficulties which face efforts to secure any minimum of essential control by state agencies, with a theoretically desirable decentralization in place of federal control.

M. P. S.

CRIMINAL LAW

Statutory changes directly or indirectly affecting criminal law were few and, in the main, unimportant, so far as the most recent sessions of both Congress and the Illinois Assembly were concerned. The former slightly broadened the offense of escape from custody, broadened the definition of property in the offense of robbing federal custodians, so as to include property not held as mail matter, and specifically added to the offense of obtaining mail by larceny or fraud, attempts so to do. The only new offense created was one providing that "whoever shall forge or counterfeit any postmarking stamp or impression thereof with intent to make it appear that such impression is a genuine postmark, or shall . . . have in possession with intent to use or sell any forged or counterfeited postmarking stamp, die, plate, or engraving . . . " shall, etc. As to the scope of this new offense, the term "postmarking stamp" has apparently never received judicial definition. The term "postmark" is generally used to describe any mark officially placed on mail matter by postal employees. Thus it includes the marks meant to cancel the postage stamp and the marks indicative of the place and time of mailing, as well as other marks

for special contingencies or types of mail (e.g., registered mail). Thus a "postmarking stamp" would seem to be a handstamp or machine by which a postmark is affixed. This interpretation would tend to protect stamp collectors against forged cancellations, where the value of the stamp was enhanced by such cancellation. Unfortunately it becomes slightly questionable because of the reference to a "stamp, die, plate, or engraving," as the process of engraving has, it is submitted, never been used for postmarking. Another guess, but, it is believed, a less plausible one,¹ is that the bill was aimed against counterfeiting postage stamps, for the protection of collectors. If so it is a question whether "postmarking stamp" can in fact be interpreted to mean "postage stamp." If it can, then does the latter term, when used in a federal statute apply only to United States stamps, or does it also include foreign issues? If the latter, another difficulty comes up. Unlike the practice of the United States, it is the practice of many foreign governments to provide only a very brief time after the appearance of a new issue, during which the old issue may be used to prepay postage. Thereafter the stamps of the old issue lose postal validity and for certain purposes cease to be regarded as "stamps" by the issuing country. It is far from clear whether such "stamps" would be included in the offense. If they are not, the new legislation confers little protection beyond that conferred by existing law, as the counterfeiting of current stamps, readily obtainable at a foreign postoffice, if not already adequately covered by law, is in any event, for obvious commercial reasons, a very small menace to collectors.

Turning to Illinois only two new statutes appear. By one of them manslaughter is removed from the list of crimes for which offenders may not be placed on probation. It is understood that this was largely because in fact manslaughter convictions were so largely made up of involuntary manslaughter cases against negligent automobile operators, where probation would frequently appear to be an excellent risk. The other item is only of an incidentally and indirectly criminal nature. It consists in the adoption of the Uniform Narcotic Drug Act, which prior to the beginning of the year had already been passed by ten other states, according to the figures of the Handbook of the Commissioners on Uniform State Laws. There are some slight changes from the language of the uniform act, some of which appear to have been inadvertent. The suggestion contained in a note to the uniform act that cannabis might be added to the list of narcotic drugs has been adopted. The uniform act contains no provision governing methods of search, seizure, and forfeiture, but recommends that each state pro-

¹ Less plausible because the subject seems already covered by U.S. Comp. Stat. § 10390 (1917).

vide its own methods. Accordingly there have been added sections declaring illegally held drugs to be contraband, governing the issuance of search warrants, and authorizing certain searches without warrant. This last section will raise some interesting questions of constitutionality. According to it, enforcement officers are empowered, "without a warrant, to enter and examine all buildings, vessels, cars, conveyances, vehicles or other structures or places, and to open and examine any box, barrel, parcel, package or other receptacle in the possession of any common carrier, which they have reason to believe contains," etc. Obviously the last quoted phrase may so far restrict the officers' authority as to safeguard the validity of all that to which it applies. But does it apply to the entire provision just quoted, or only to the opening and examining of boxes, etc.? The latter construction would seem to be the easier, as the verb "contains," being in the singular, can hardly be predicated with the plural nouns in the former clause. So construed there remains no express limitation on the right to enter and examine. Similarly obscure is the scope of the limitation "in the possession of any common carrier." Does this phrase apply only to "any box," etc., or also to "all buildings," etc.? The second paragraph of the same section forbids hindering an officer in such entrance and examination, and in case of hindrance any license to deal in narcotics held by the hinderer shall be subject to revocation. Does this paragraph, then, so restrict the entire section as to save it, viz., by confining its applicability and consequences to holders of licenses, who may merely be deprived of such licenses? But the language of the paragraph appears rather to suggest that the prohibition of hindering applies to all persons, licensees or not, with licensees undergoing the further possible disadvantage of a revocation of their privilege. This broader construction is borne out by the reference, in paragraph one, to common carriers. As these can hardly be likely to hold licenses, it seems that the prohibitory language applies to all hindering persons, whether licensees or not. The second paragraph, therefore, seems to strengthen the inference that the first seeks to confer a general authority of entrance and search without restrictions.

E. W. P.

ANTI HEART BALM LEGISLATION*

There are, no doubt, many instances of justifiable suits based on alienation of affections, breach of promise, criminal conversation and seduction.

* See for common-law background and complete discussion of the proposed and existing statutes, Feinsinger, Legislative Attack on "Heart Balm," 33 Mich. L. Rev. 979 (1935) and Feinsinger, Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions, 10 Wis. L. Rev. 417 (1935).

But the legislators of several states apparently believe that most of such actions are either hold-ups or shake-downs, brought by scheming citizens who prefer the lucrative state of affairs on which their rights of action are founded to the domestic tranquillity and security for injury to which such actions afford compensation. Furthermore, many of such actions are brought or are threatened on the flimsiest of trumped-up and perjured evidence in the hope that the defendant will settle quietly rather than endure the humiliation of a public trial with the possibility of defeat and heavy damages at the hands of a jury. This is simply legalized blackmail and the legislators of several states, including Illinois, have put an end to such actions altogether as the only way of eliminating the sharp practices which have grown up around them. This measure denies recourse to those who might have just claims; but such persons must suffer in order to insure relief from these predatory abuses of the courts and the common law.

The Indiana legislature began the movement to abolish these "heart balm" actions at the suggestion of the only woman member, Mrs. Roberta West Nicholson. Their act,² designated as one to promote public morals, abolishes civil causes of action for alienation of affections, breach of promise to marry, criminal conversation and seduction of females aged twenty-one or more, excepting, of course, all causes of action already accrued. It attempts to deny efficacy to any future conduct of men and women in Indiana to give rise in any way to any of the abolished causes of action, in Indiana or elsewhere. And to clinch the matter effectively, it makes it a felony not only for either litigant or attorney "to file, cause to be filed, threaten to file, or threaten to cause to be filed" any pleading of one of the abolished causes of action, whether it arose within or without the state, but also for anyone to induce another to settle such a claim by giving or promising anything of value or for anyone to receive anything of value in settlement of such a claim. Not only is a contract of settlement of such a claim unlawful, but the initiation of any suit based on its breach is a felony.

The same act allows only sixty days within which already existing causes of action may be sued upon and out of what seems unnecessarily abundant caution, allows sixty days after the breach of any promise or contract to marry which exists at the time this statute came into effect, however remotely such breach may occur in the future. In addition this statute has extensive provisions governing the disclosure of the name of any correspondent in an action for divorce, separate maintenance, annulment of marriage, or for the custody of children.

² Chapter 208, House Bill no. 138, approved March 13, 1935.

Sixteen days later a similar statute became law in New York.² This statute declares that the remedies for enforcement of the actions in question:

having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of fraud.³

public interest is best secured by abolishing the actions altogether. The statute is practically identical with that in Indiana except that it abolishes all civil actions arising from seduction, regardless of the age or sex of the plaintiff, and has no sections regulating the disclosure of the corespondent's name in divorce and similar proceedings.

Apparently the next state to adopt a statute of this sort was Michigan. The provisions of that statute⁴ are substantially similar to those in the Indiana and New York laws, except that in Michigan, actions for the seduction "of any person of the age of eighteen years or more" are abolished. Section one of the Michigan statute abolishes, among other things, "all civil causes of action for alienation of affections," but in section two appears the following qualification:

Provided, however, that the provisions of this Act shall not apply to suits for alienation of the affections of a husband or wife against a defendant who is a parent, brother, sister or person in loco parentis of the plaintiff's spouse.

This act regulates the disclosure of the corespondent's name in divorce and similar actions just as the Indiana act does. In addition it fixes the period of limitations for existing causes of action at ninety days and abolishes body execution "on any judgment heretofore rendered" based on any of the causes of action under discussion. The legislature must have intended this last provision to apply to future judgments as well, but its language failed to express such a purpose.

The Illinois statute⁵ finally became law without the signature of the governor, on July 1, 1935. This statute is substantially similar in effect to the others just discussed, although there are some formal differences. For instance, it does not abolish the causes of action for alienation of affections, etc., but only forbids the bringing of such actions, making it unlawful and a felony to file, cause to be filed, threaten to file or threaten

² N.Y. Civil Practice Act 1935, Art. 2-A, §§ 61-a through 61-i, adopted March 29, 1935.

³ *Ibid.*, § 61-a.

⁴ Public Act no. 127, Acts of 1935, approved June 3, 1935.

⁵ Ill. Rev. Stat. 1935, c. 38, §§ 58 (1)-58(6).

to cause to be filed any pleading or papers of this sort. Apparently the sponsor of this act had some misgivings, because on April 30, after the passing of the present act seemed certain, he introduced House Bill No. 909 entitled, "A Bill for an Act to Abolish Certain Civil Causes of Action," namely, those upon which the bringing of an action was already forbidden by the Illinois statute under discussion. But the statute, as it finally appeared, must have been deemed sufficient, because this bill was tabled and has been heard of no more.

The Illinois act differs from all of the others in not forbidding actions for seduction at all, although the bill as originally introduced did cover such actions. Whether or not the legislature was wise in retaining the civil action for seduction as it did is, of course, debatable. Offhand, such a course seems wiser than abolishing it entirely as the New York legislature did. Since such an action is brought by the girl's parent and not by herself and since it is probably not greatly abused anyhow, it would seem better to permit the action unless the girl in question is twenty-one or over, as in the Indiana act. If it were only a question of when a girl should decide for herself what her way of life shall be, perhaps the New York or Michigan statute is best. But a girl old enough to live her own personal life, although still under twenty-one, is nevertheless still a member of her parents' family and has considerable influence on younger brothers and sisters. Furthermore she is still a responsibility of her parent who may be somewhat interested in conserving at its utmost value the considerable investment of time, money and affection he has by that time usually made in her. Granting that a parent must accept what comes after his daughter has passed twenty-one and is "her own woman," so to speak, most people probably feel that the parent deserves some compensation for the devaluation of what he may have been at considerable pains to create. On the whole, the Indiana legislation seems most desirable.

Some concern may exist for the future of civil actions in New York for seduction at the instance of a girl under eighteen, the age below which she is deemed incapable of consenting to sexual intercourse. Such an action could be called one for assault and battery for rape, and as such be allowed, although such an action is frequently spoken of as a suit for seduction. It seems fairly clear, however, that a statute such as New York's is not intended to interfere with the civil action of a girl under the statutory age of consent.

The Illinois act includes two sections regulating the disclosure of the correspondent's name in divorce and similar types of actions. Whether these provisions are designed to protect the correspondent simply from un-

necessary publicity or from blackmail is uncertain; but the latter purpose seems to have been uppermost in the legislature's mind, judging from the title of the statute and the stringency of the punishment for violation of these sections.

Similar bills designed to abolish or regulate this so-called Heart Balm litigation have been introduced in California, Nebraska, New Jersey, Ohio and Washington, although it is not known whether such bills became law in any of these states. Inasmuch as the subject has had pretty widespread publicity, it is likely to come up with increasing frequency before legislatures generally and a growing list of statutes similar to the Illinois act is more or less inevitable.⁶

In a statement to the Associated Press on May 10, Governor Horner said that he would like to veto the Heart Balm Bill on grounds that it was unconstitutional,⁷ but would permit it to become law without his signature in view of the number of supporters of the bill in the General Assembly.

It is somewhat difficult to understand what part of the Illinois statute could possibly arouse the governor's doubts as to its constitutionality. It certainly does not upset any existing property rights except the lucrative practice of lawyers making a specialty of such litigation, and it goes to

⁶ After this note went to press two additional recently published statutes were found by the writer. The first of these is a Pennsylvania act, approved June 22, 1935, cited as Act of General Assembly, no. 189; and the second is a New Jersey act approved June 27, 1935, and cited as Laws of 1935, c. 279. The New Jersey act is practically the same as that of New York. The Pennsylvania act, however, applies only to alienation of affections, making the same exceptions found in the Michigan statute, and to breach of promise to marry. Neither statute protects the correspondent in a divorce suit.

⁷ As to constitutionality of this legislation generally, see Myers, *Validity of Statutes Prohibiting Breach of Promise and Alienation Suits*, 2 Ohio L. Rev. 146 (1935), and Hibschan, *Can "Legal Blackmail" be Legally Outlawed?*, 69 United States L. Rev. 474 (1935). This latter article contains an excellent brief sketch of the common-law background of these statutes in which the author indicates the nature of the common-law rights which these statutes abolish. It then discusses at length the judicial disposition of various types of statutes abolishing common-law remedies, the constitutionality of which was successfully assailed because they went too far. Mr. Hibschan believes that the anti heart balm statutes are also unconstitutional because they go too far. He believes that if the legislatures had abolished recovery for punitive damages in actions for breach of promise, alienation of affections, criminal conversation and seduction and had retained the actions for actual damages only, the evil of these actions as a means of legalized blackmail would have been constitutionally obviated.

It seems, however, that Mr. Hibschan overlooks the nature of the actions abolished in these statutes and also the objective of the legislatures passing them. Many men would pay a great deal to avoid having any of such actions brought against them at all, whether for actual damages or for punitive damages; hence a threat to bring such a suit or actually initiating it would be sufficient to make many "come across" in order to keep their names in good odor. This is exactly what the legislatures have attempted to avoid and accounts for their making such threats or the actual filing of suit criminal instead of simply abolishing the common-law rights of action.

unnecessary extremes to avoid doing so. On the whole, the statute seems thoroughly in compliance with the Constitution, the only plausible objection to it being that in forbidding these actions altogether, the legislature may deny legal recourse to people in great need thereof, who have really suffered damages, and who would not be using the suit simply for extortion.⁸

The New York provision entirely abolishing actions for seduction and the Michigan statute permitting such actions only when the girl is under eighteen, may be assailed in that they deprive the girl's parent of a property right. But it is unlikely that such an attack would be successful. It is true that at common law the parent's interest in such action has always been termed a "property right," but this has been changed in many states and everyone is aware that the parent was allowed substantial damages for the personal wrong done to himself as head of the girl's family. Even if abolishing the action for seduction is a deprivation of property, however, it might be justified as the only practical way to prevent the abuse of such action by litigants who are more interested in the extortion of money than in compensation for injury to such a right.

On the whole the anti Heart Balm legislation must appeal to all members of the bar who believe in promoting social decency among citizens and in preserving the high ideals of the common law.

C. O. G.

⁸ It is possible that Governor Horner's objections have nothing to do with the merits of measures of the act itself, but are made on the belief that some subject is embraced in the act which is not expressed in the title and that such act is therefore void and unconstitutional under article 4, section 13 of the Constitution. The title of the act is as follows: "An Act in relation to certain causes of action conducive to extortion and blackmail, and to declare illegal, contracts and acts made and done in pursuance thereof." The only subject introduced into the act which is not described or included in the title is the matter referring to the disclosure of a correspondent's name in certain actions and proceedings. But if this were objectionable under article 4, section 13 of the Constitution, all would not be lost since "such act shall be void only as to so much thereof as shall not be so expressed."

The chief object of the act, however, is to suppress certain types of extortion and blackmail, which is made as easily possible by the disclosure or threatened disclosure of a correspondent's name as by the other conduct forbidden in the act.

The Attorney General's opinion concerning the Illinois act, filed April 29, 1935, indicates that he believes the statute to be unconstitutional not only under article 4, section 13 of the Constitution but also under article 2, section 19, thereof, which reads in part: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation; . . ." To support his opinion, the Attorney General merely refers to a decision in which a court held that a statute denying an action to a guest in an automobile for the negligent driving of his host was unconstitutional. *Stewart v. Houk*, 127 Ore. 589, 271 Pac. 998 (1928). But even the Attorney General admitted that this authority might not be conclusive.

CIVIL RIGHTS

In 1885 the Illinois General Assembly decided to protect negroes and passed a Civil Rights Act to prohibit discriminations in certain places based on race or color. Section one of the original act applied only to "inns, restaurants, eating houses, barber shops, public conveyances on land or water, theatres and all other places of public accommodation and amusement." The interpretation of this section resulted in an application of the rule of *ejusdem generis* and thus it was held that a proprietor of a drug store who refused to sell a cherry phosphate to a person of color had not violated the statute.¹

The result of this decision was that section one was extended to include many other establishments than those mentioned in the original act. Section one was further extended by House Bill No. 330 which was passed by the Illinois General Assembly in 1935 and is now a law with the approval of the Governor. The act was held to be constitutional.² Both of the Illinois cases concerned theatres and the decisions do not necessarily hold that the statute is valid as to every establishment specified therein, nor do they necessarily approve of the discrimination involved in the omission of certain occupations, such as grocery and clothing stores, which may be made specific issues in later cases. Nevertheless, the chance of the expanded section one being held to violate due process and equal protection seems to be fairly remote.

The interpretation of the Civil Rights Act before 1935 was on the side of strictness. The application of the rule of *ejusdem generis* has been stated. In *Grace v. Moseley*³ the court said that the act was an addition to the common law and: "Hence it is to be construed strictly."⁴ A judgment was reversed and remanded for what seems to have been merely an abstract error that did not concern the merits of the controversy. What should be said of *People ex rel. v. Cemetery Co.*,⁵ is less certain. An amendment to the original act, which did not include cemeteries within its listing, provided, "nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery

¹ Cecil v. Green, 60 Ill. App. 61, 161 Ill. 265, 43 N.E. 1105 (1896).

² Baylies v. Curry, 128 Ill. 287, 21 N.E. 595 (1889) (not argued to contrary) and Pickett v. Kuchan, 323 Ill. 138, 153 N.E. 667 (1926); 11 Minn. L. Rev. 463 (1926). See also *People v. King*, 110 N.Y. 418, 18 N.E. 245 (1888), 1 L. R. A. 293; 22 Ill. L. Rev. 667 (1928); 5 Notre Dame Lawyer 322 (1930).

³ 112 Ill. App. 100 (1904).

⁴ 112 Ill. App. 100, 102 (1904).

⁵ 258 Ill. 36, 101 N.E. 219 (1913).

or place for burying the dead." But it was held that the relator, a negro, could not compel the defendant to sell him space for burying his wife even though the refusal was based on color alone. The U.S. Supreme Court refused to review this decision for want of jurisdiction.⁶ This decision of the Illinois Supreme Court means that the amendment is likely to have no practical effect. True, a cemetery company cannot sell space to negroes at a price that discriminates against them, but a cemetery company that desired to have such a sales policy, apparently could accomplish its ultimate object by refusing to sell to persons of color in any event. The latter is held to be legal. Before one can condemn this holding, however, he should be prepared to answer the question, why was not the word "cemeteries," as a place of public accommodation, included in section one just as one finds there the words "funeral hearses." The fact that no change of this sort was made in the statute in 1935 is also a matter for cogitation.

In *White v. Pasfield*,⁷ an attempt to enforce the Civil Rights Act by means of an injunction failed. The bill attempted to present a case of negroes being refused the use of bathing facilities in a public park supported by taxation. The pool was under lease to two private individuals but the holding, aside from an imperfection in the bill, was that equity has no jurisdiction over mere personal rights that do not involve property interests.

If one may judge from the few cases in the appellate reports that involve the Civil Rights Act and from the results of them it would appear that the act has not been a vital force in the State. Drastic changes were enacted by the last General Assembly. Section two of the original act provided two methods of enforcing the principles stated in section one. One was a penalty provision in favor of the person aggrieved, and the other was a criminal provision, denouncing the conduct as a misdemeanor. Then section two ended with a proviso, "that a judgment in favor of the party aggrieved, or punishment upon an indictment, shall be a bar to either prosecution respectively." The 1935 act entirely omits this proviso.

The purpose of this omission was to prepare the way for the enactment of seven new sections. The most important change in the law thus made is to declare in section five that any establishment or facility therein mentioned, the same as those listed in section one, wherein any provision of section one is violated is a "public nuisance, and may be abated." Apparently this declaration applies to a single violation even though there is

⁶ 238 U.S. 606, 35 Sup. Ct. 602 (1915).

⁷ 212 Ill. App. 73 (1918).

no intention for violations of section one to continue. The next provision in section five is: "The owners, agents, and occupants of any such place shall be deemed guilty of maintaining a public nuisance, and may be enjoined as hereinafter provided." That this provides for an injunction that extends beyond "any such place" is made more clear by the last two sentences of section six:

Upon the trial of the cause, on finding that the material allegations of the petition are true, the court shall order such nuisance to be abated, and enjoin *all* persons from maintaining or permitting such nuisance. When any injunction, as herein provided has been granted it shall be binding upon the defendant and shall act as an injunction *in personam* against the defendant throughout the State.

The word "all" has been italicized. It is supposed that this will be interpreted as meaning all who are made defendants. Otherwise, how can there be procedural due process? Perhaps, however, the development of the "labor injunction" may justify this statutory word "all" unless the labor injunction is to be regarded as *sui generis*.⁸ The general theory of this legislation seems to be that if the occupant "of any such place" discriminates, the owner and even the agent of the "place" is likewise guilty of maintaining a public nuisance and all three of them, apparently, may suffer injunctions even though neither the owner nor the agent was the cause or even aware of the discrimination practiced by the occupant. Other interpretations are possible and apparently much will remain uncertain until the new sections have gone over several hurdles of court interpretation.⁹ But the indications are that owners and agents of the various properties mentioned in the act have reason to be concerned about the broad language of the new sections.¹⁰ Once an injunction or an order of abatement has been issued, a violation of it renders the offender subject to punishment for contempt of court.¹¹

Just what is meant by the provision in section six that this public nuisance shall be "abated"? There is no specific provision for locking the property and preventing its use for a definite period unless a bond is given to secure against additional violations of the statute. Is the abatement to occur by merely compelling a cessation of the business? If so, the property in which the business was conducted would be available for another business. In order to abate is it necessary to destroy the building "wherein" the nuisance occurred? The writer cannot strain his imagination to the extent of believing that the Illinois Supreme Court would approve a de-

⁸ See Frankfurter and Greene, *The Labor Injunction* 86-89, 123-126 (1930).

⁹ See *Webb v. U.S.*, 14 F. (2d) 574 (C. C. A. 8th, 1926); 75 U. Pa. L. Rev. 375 (1927); 40 Harv. L. Rev. 786 (1927); see note, 49 A. L. R. 612 (1927).

¹⁰ See, in addition, 59 A. L. R. 624 (1924), and 63 A. L. R. 698 (1929).

¹¹ Sec. 7.

cree that ordered the destruction of the building known as the Stevens Hotel, because it was determined that a discrimination on the basis of race or color occurred in that building. Surely, that would be too much for the concept of due process. It would be folly to predict how much can be done, short of this extreme example, and still render due process of law.

In one respect the new sections are less extreme than some modern examples that extend the injunction process as a way of enforcing a rule of law, the violation of which is also a crime against society. The action to enjoin, and also, apparently, to abate, even though the word "abate" does not appear in the first line of section six, may not be brought by a private citizen. A question may arise if this private citizen can show injury peculiar to himself, as well as racial discrimination, but section six mentions only the attorney-general of the state and the state's attorney of the county where the nuisance exists.

It is interesting to observe that the action is to be "tried as an action in equity by the court without a jury." Apparently under this provision an equity court cannot take the advice of a jury even if it wishes to do so. It would seem that the negroes are not convinced that in this matter juries are required or useful to protect citizens in the exercise of their privileges. Perhaps they remember what the Illinois Supreme Court found necessary to correct in *People ex rel. v. Board of Education*,¹² *People ex rel. v. Mayor of Alton*,¹³ *People ex rel. v. Mayor of Alton*,¹⁴ and *People ex rel. v. Mayor of Alton*.¹⁵

Section six requires a verified petition and provides for a temporary injunction. Presumably the provision as to notice of the application (line 11, H.B. No. 330) has reference only to a temporary, not the final injunction. An express provision eliminates the necessity of a bond in instituting the proceedings.

Sections eight to ten inclusive contain fairly elaborate provisions imposing duties upon various officials to enforce the Civil Rights Act as amended. It seems clear that the authors of H.B. No. 330 realized that enforcement of the act would be unpopular. The draftsmanship of these provisions as well as sections five and six could have been improved. The main weakness seems to be that it was not kept clearly in mind that equity would act in two capacities: (1) to abate nuisances and (2) decree injunctions. Thus, in section nine it is declared to be the duty of the states' attorney to proceed to abate a nuisance and to prosecute the one

¹² 127 Ill. 613, 21 N.E. 187 (1889).

¹³ 179 Ill. 615, 54 N.E. 421 (1899).

¹⁴ 193 Ill. 309, 61 N.E. 1077 (1901).

¹⁵ 209 Ill. 461, 70 N.E. 640 (1904) ("the verdict [of the jury] can only be accounted for as a product of passion or prejudice").

responsible therefor, but nothing is expressed in this section about his duty to enjoin the violator. Yet this last procedure seems to be the main thing emphasized in section six. After all, however, sections eight and nine seem to be just so many words. If an official is not impressed by the responsibilities of his office, thundering at him through a statute is not likely to make an appreciable difference. Nevertheless, section ten provides under certain conditions that if the attorney-general or the state's attorney fails to proceed "to abate the nuisance" the circuit court is required to appoint a special assistant attorney-general or state's attorney for that purpose.

Are these amendments to the Civil Rights Act providing for this new equity procedure consistent with constitutional guarantees? No other legislative effort of this sort has been tested in the courts so far as is known. But the use of the injunction and abatement method has withstood constitutional assaults, with very little exception, in efforts to suppress intoxicating liquor, gambling, and prostitution.¹⁶ The Illinois Supreme Court has followed the majority point of view.¹⁷

A question arises as to how far a legislature may extend the idea of declaring anti-social conduct to be a "public nuisance" and then proceed to provide for enforcement through injunction and abatement.¹⁸ In *Board of Medical Examiners v. Freenor*,¹⁹ an injunction against the practice of medicine by a chiropractor was approved. A statute of Utah authorized such an injunction even though no expression appears concerning public nuisance. Curiously, no claim was made that the statute was unconstitutional. But this Utah statute was held to be constitutional in *Board of Medical Examiners v. Blair*.²⁰ There are instances where injunctions have been issued to prevent prize fights, bull fights, conspiracy to violate election laws, a violation of a zoning ordinance, etc., even though there was no statute that specifically granted power to equity to enjoin such affairs.²¹

¹⁶ See *State ex rel. v. Ryder*, 126 Minn. 95, 147 N.W. 953 (1914); *Marvel v. State, ex rel. Morrow*, 127 Ark. 595, 193 S.W. 259 (1917). *Contra*: *Hedden v. Hand*, 90 N.J. Eq. 583, 107 Atl. 285 (1919); all the subject of an annotation in 5 A. L. R. 1474 (1920); *King v. Comm. ex rel. Smith*, 194 Ky. 143, 238 S.W. 373 (1922), 22 A. L. R. 535; *People ex rel. v. Elmore*, 256 N.Y. 489, 177 N.E. 14 (1931), 75 A. L. R. 1292; 20 Col. L. Rev. 605 (1920).

¹⁷ *Stead v. Fortner*, 255 Ill. 468, 99 N.E. 680 (1912); *People ex rel. v. Smith*, 275 Ill. 256, 114 N.E. 31 (1916), L. R. A. 1917B 1075 (some of the cautious language in this opinion casts doubt upon some of the more extreme provisions of §§ 5 and 6 of the Civil Rights Act); *City of Herrin v. Fatima*, 230 Ill. App. 221 (1923) (*cf.* *City of Jacksonville v. Vieira*, 184 Ill. App. 279 (1913)).

¹⁸ See 73 U. Pa. L. Rev. 185 (1925).

¹⁹ 47 Utah 430, 154 Pac. 941 (1916).

²⁰ 57 Utah 516, 196 Pac. 221 (1921).

²¹ See *New Orleans v. Liberty Shop*, 157 La. 26, 101 So. 798 (1924), 40 A. L. R. 1136 (annotated), and 13 Calif. L. Rev. 63 (1924).

Such cases, however, depend upon an uncertain principle. Georgia and Illinois, for example, have refused to enjoin the unlicensed practice of chiropractic.²² The Minnesota Supreme Court sustained a statute permitting an injunction against one who regularly or customarily published "a malicious, scandalous and defamatory newspaper," declaring such conduct to be a nuisance.²³ The Minnesota court admitted that: "It (the legislature) has no right arbitrarily to declare something to be a nuisance which is clearly not one."²⁴ Then the United States Supreme Court, five to four, held that this statutory provision violated the Fourteenth Amendment as an infringement of the liberty of the press.²⁵ Whether under the same statute the injunction method could be used to suppress the business of regularly or customarily publishing "an obscene, lewd and lascivious newspaper" was not decided.

There is another question of interest. Is it permissible under constitutional guarantees to place under injunction one who violates the Civil Rights Act and hold him to be enjoined from certain activities in any place as long as he remains in the state? In *U.S. v. Cunningham*,²⁶ Woodrough, D. J., refused to enjoin the defendant from further "bootlegging" under the National Prohibition Act. This, said he, would result in a violation of the guaranty of trial by jury. The opposite view was set forth in *U.S. v. Lockhart*,²⁷ where Munger, D.J., gave careful consideration to the problem and refused to dismiss a bill for what courts have called a personal injunction. Then Woodrough, D. J., in *U.S. v. Cunningham*,²⁸ stated his point of view more elaborately in a passionate opinion, that presents the problem as to how far equity will be permitted to gobble up the criminal law as far as trial by jury is concerned. This manifestation of a lack of confidence in the jury system is an interesting development. To what extent should judges exert their powers against it? "The courts might well follow the legislatures in treating the problem as an eminently practical one."²⁹ The Circuit Court of Appeals for the ninth circuit affirmed a judgment against Sally Simon for contempt of court after a

²² See *Dean v. State ex rel. Anderson*, 151 Ga. 371, 106 S.E. 792 (1921), 40 A. L. R. 1132; *People ex rel. Shephardson v. Universal Chiropractors' Assn.*, 302 Ill. 228, 134 N.E. 4 (1922).

²³ *State ex rel. v. Guilford*, 174 Minn. 457, 219 N.W. 770 (1928).

²⁴ 174 Minn. 457, 219 N.W. 770 (1928).

²⁵ *Near v. Minnesota*, 283 U.S. 697, 51 Sup. Ct. 625 (1931).

²⁶ 21 F. (2d) 800 (D.C. Neb. 1927). Approved in 30 Col. L. Rev. 730 (1930). See also 29 Col. L. Rev. 212 (1929), and 43 Harv. L. Rev. 499 (1930).

²⁷ 33 F. (2d) 597 (D.C. Neb. 1929).

²⁸ 37 F. (2d) 349 (D.C. Neb. 1929). See 43 Harv. L. Rev. 1159 (1930).

²⁹ 45 Harv. L. Rev. 1096, 1100 (1932).

violation of a so-called personal injunction under the National Prohibition Act. The opinion of Munger, D. J., was preferred to that of Woodrough, D. J., and it was also held that there was no violation of due process under the Fifth Amendment.³⁰ It was held in *State v. Brush*,³¹ that it was not proper to enjoin one guilty of sales of liquor on certain premises from selling liquor "upon any other premises in the county of Christian or the State of Illinois." But the court made it clear that the injunction had not been issued under the section of the Illinois act permitting "personal" injunctions.

K. C. S.

WAGE ASSIGNMENTS

The assignment of wages is regulated by an Illinois act of July 1, 1935.¹ The act is not applicable to transactions governed by the Small Loans Act² or by the Credit Union Act.³ It provides a moderate scheme of wage assignment regulation, comparable to schemes existing elsewhere, sometimes with more sweeping effect.⁴ The act requires a clear written assignment, of which the wage-earner is to have a copy. It permits an assignment only of wages due or which may become due, from the employer who is such at the time of the assignment, and permits an assignment only to secure an existing debt or one contracted at the time of the assignment. It regulates the conditions under which a demand on an employer may be made by an assignee, in such a way as to limit vexatious demands. Not more than twenty-five per cent of the wages of a wage-earner are subject to collection by any assignee or group of assignees; and assignees are permitted to collect in the order of priority of service of demands. A penalty is imposed for willfully serving a demand by virtue of an invalid assignment or for willfully serving an invalid demand. No wage assignment is to be valid after three years from its execution; and a provision is made for the discharge of claims resulting from wage assignments by the assignor's bankruptcy and adjudication.⁵ The act is not retroactive, and its provisions are made separable so far as possible.

³⁰ *Simon v. U.S.*, 62 F. (2d) 13 (C. C. A. 9th 1933).

³¹ 318 Ill. 307, 149 N.E. 262 (1925).

¹ Ill. Rev. Stat. 1935, c. 48, § 22.

² Ill. Rev. Stat. 1935, c. 48, § 22 (9).

³ *Ibid.*

⁴ See Fortas, *Wage Assignments in Chicago*, 42 Yale L. J. 526 (1933) for a useful treatment of the Chicago situation and the leading Illinois cases, in relation to situations, legislation, and decisions elsewhere.

⁵ This provision incorporates into the statutes a rule, contrary to the rule formerly prevailing in Illinois, announced in an opinion criticizing the Illinois cases, by the Supreme Court of the United States. *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934); 93 A.L.R. 195, with a note at 202 (1934).

Efforts of Armour & Co. to protect itself and its employes against the evils connected with wage assignments were defeated in 1931 by the opposing efforts of merchants who desired particularly to leave employes free to use assignments as security for credit.⁶ Armour & Co. had entered into contracts with its workers by the terms of which no assignment of wages was to be effective; and it notified business firms, including the firm which secured the assignment involved in the litigation, of the existence and terms of these contracts. The firm in question nevertheless took an assignment of a worker's wages due and to become due from the company in a three year period; and was ultimately successful in winning a judgment against Armour & Co. The Supreme Court held the attempt to prevent an assignment, an unwarranted interference with the freedom of workers to dispose of their claims to earnings. The decision is inconsistent with the rules generally applicable to assignments⁷ and has been criticized.⁸ The history of the assignment of contract rights, their peculiar qualities, their limited life, and the peculiar questions which wage assignments may raise, suggest doubts about the decision.

The conflict of interests which appeared in this case has appeared also in cases dealing with the regulation of wage assignments by legislation. An Illinois statute of 1905 regulating the assignment of wages and salaries was held unconstitutional on the ground that it was an unwarranted interference with the constitutional liberty of salary earners, as distinct from wage-earners.⁹ Subsequently, the Illinois Small Loans Law of 1917, including regulations of assignments of both wages and salaries to secure loans of not more than \$300.00, was held constitutional.¹⁰ In view of language in the *Armour* case, suggesting the possibility that the prohibition or regulation of wage assignments by legislation might encounter constitutional difficulties, a passage in the opinion upholding the Small Loans Act against constitutional objection is suggestive. Referring to the earlier constitutional decision the court said:

In that case an act of the legislature which rendered invalid an assignment of wages or salary unless it was in writing and signed by the assignor and duly acknowledged

⁶ *State Street Furniture Co. v. Armour & Co.*, 345 Ill. 160, 177 N.E. 702 (1931).

⁷ *Mueller v. Northwestern University*, 195 Ill. 236, 63 N.E. 110 (1902); *Sperry & Hutchinson v. Siegel-Cooper Co.*, 309 Ill. 193, 140 N.E. 864 (1923); *Restatement, Contracts*, § 151c (1932). Cf. *Portuguese-American Bank v. Welles*, 242 U.S. 7 (1916); *Ginsburg v. Bull Dog Auto Fire Insurance Assn.*, 328 Ill. 571, 160 N.E. 145 (1928).

⁸ See note, 45 Harv. L. Rev. 581 (1932); cf. notes, 41 Yale L. J. 464 (1932), 26 Ill. L. Rev. 800 (1932).

⁹ *Massie v. Cessna*, 239 Ill. 352, 88 N.E. 152 (1909).

¹⁰ *People v. Stokes*, 281 Ill. 159, 118 N.E. 87 (1917).

before a justice of the peace and entered upon his docket and notice thereof served upon the employer was held unconstitutional on the ground it applied not only to the wages of artisans, mechanics, laborers and others employed in various manual occupations, but also to salaries and compensation for personal services of highly salaried officers of corporations and public officers who were not in need of the protection of laws of that kind; also for the further reason it made an assignment of wages given as security for a usurious loan void, while the law of the State made no such provision with reference to other instruments given as security for such loans. It was, however, there pointed out that wage earners were the proper objects of legislation which would tend to protect them from the evils which this statute was designed to prevent, and that such an act would not be rendered invalid because it placed reasonable limitations upon the right to assign such wages as security for an indebtedness and prescribed a reasonable method to be pursued in making such an assignment effective. It was further pointed out that it was undoubtedly true many persons who were salaried received compensation no greater in amount per month or year than that received by some wage earners, and that the question as to whether or not a statute protecting a salary not greater in amount than a certain sum per week or month, or protecting a portion of such salary not in excess of a certain sum per month or week, would be valid, was not before the court for decision. The language of the opinion, however, indicates a statute of that character would be valid.¹²

The opinion here expressed agrees with the weight of authority on the subject; and it is to be supposed that it will be followed in Illinois.¹²

While the importance of wage assignments should not be overestimated,¹³ a consideration of the problem which they create may serve as a reminder that reasonably high wages and reasonable limitations on credit facilities may prove essential for the health of our economic system.

M. P. S.

HABEAS CORPUS

The ancient writ of habeas corpus has been the source of an appreciable amount of trouble in Illinois during the last few decades. It seems reasonably clear that there has been a judicial abuse of the writ. Part of the abuse seems to have resulted from the perversity or misapplied sympathy of certain judges; part of it appears to have been occasioned by a misunderstanding of the law concerning the writ; and part of it will be charged to the difficulty of understanding some of the law on the subject,

¹² 281 Ill. 159, 171-172; 118 N.E. 87 (1917).

¹³ See note, 37 A. L. R. 872 (1925).

¹⁴ See 9 Writings and Speeches of Daniel Webster 3-39 (Nat. ed. 1903) for two of Webster's speeches advocating a federal bankruptcy law, including an interesting argument that inflation, induced by "indorsement and suretyship" secured by promised preferences would be checked and orderly deflation promoted by such a law. For a treatment of another aspect of the problem of wage-earner credit, and some references on the problem as a whole, see Minahan, Wage-Earner Garnishment; a Plan for Personal Receivership, 10 Wis. L. Rev. 223 (1935).

particularly the meaning of that very elusive conception of "jurisdiction."

Several years ago criticism was expressed of the action of a Chicago judge in turning loose upon the public a murderer, who had been incarcerated for a number of years, and then one who had been convicted in DuPage County for an assault with intent to commit rape.¹ Hope was then expressed that new legislation might prevent at least a judge in Chicago from giving freedom to one convicted in another judicial circuit and in general prevent a lawyer from "springing" a criminal from custody by "shopping around" until he found a favorable judge. It was far from satisfactory to the public to have the state's attorney limited to a mandamus proceedings to "expunge" the record granting a writ of habeas corpus after such a man as James "Fur" Sammons had been freed from custody by virtue of the latter writ.

In the last General Assembly Senator Ward introduced in and passed through the Senate, Bill No. 249. A duplicate House Bill, No. 628, was introduced in the house by Representative Sinnett. They met in the House Committee on Judiciary and there they stopped. The most that could be obtained, apparently, from this house committee was House Bill No. 746. The statute at that time provided in section two of the Habeas Corpus Act (Smith-Hurd, c. 65) that the application for the writ "shall be made to the court or judge authorized to issue the same." House Bill No. 746 amended this provision by adding at the end of section two a provision

that such application shall be made to the Supreme Court or to a court of competent jurisdiction of the city or of the county in which the person in whose behalf the application is made, is imprisoned or restrained, or to a court of competent jurisdiction of the city from which said person was sentenced or committed or of the county from which said person was sentenced or committed.

This bill became a law with the approval of the Governor and it should be helpful in preventing an indiscriminate "shopping around" the state from Cairo to Chicago and from east to west in an effort to find a judge with a queer notion of justice. ~

In one respect House Bill No. 746 improved upon the original proposal, Senate Bill No. 249 and House Bill No. 628. The latter provided that the application could be made within the county "or judicial circuit" where the petitioner was "imprisoned or restrained" or "sentenced or committed" as the case might be. As set forth, House Bill No. 746 restricted this proposal by eliminating the words "or judicial circuit."

¹ See 23 Ill. L. Rev. 695 (1929), and 24 Ill. L. Rev. 566 (1930).

In another respect, House Bill No. 746 as a matter of words appears to have extended the proposal in Senate Bill No. 249 and House Bill No. 628. It provided that the application for the writ may be made to the "Supreme Court." But this seems nothing more than a necessary recognition of the force of section two of article six of the Illinois constitution to say nothing of section thirteen of chapter thirty-seven of Smith-Hurd statutes dealing with courts.

Senate Bill No. 249 and House Bill No. 628 proposed also to amend by adding to section three of the Habeas Corpus Act which has provisions as to the contents of the petition for the writ. It was proposed to require the petitioner to aver that the legality of his imprisonment had not been determined in a previous proceeding "of the same character," "and that no application had been previously made for the writ and refused by any court or judge authorized to issue the same." This proposal seems meritorious as tending to prevent successive applications until a favorable judge is discovered. However, it apparently would not have prevented informal applications before judges who are willing to give curbstone opinions as to what they will decide if and when an application is formally presented. Then under the provisions of House Bill No. 746, now a statute, the number of applications that can be made is rather closely limited except in the county of Cook where it is possible that successive applications may be filed before many judges unless this is checked to some extent by rules of court, as apparently it has been in the Criminal Court of Cook County.²

Senate Bill No. 249 and House Bill No. 628 also added a new section requiring a two day notice to the attorney general where the petitioner was "an inmate of a penal, correctional or benevolent institution." In all other cases a like notice was to be given to the state's attorney of the county where petitioner was restrained. These provisions seem reasonable, provided the notice left with a person in charge of the respective offices would be sufficient. It was also proposed to add a new section giving either party an appeal to or a writ of error from the Supreme Court. This also seems desirable if it is coupled with a provision that the appeal or writ of error may be a supersedeas in proper cases.

The final impression is that the Habeas Corpus Act should be redrafted and that discrimination should be made between the various types of applicants. One trouble concerns individuals who have been convicted of felonies and are in penal institutions. Why should not the statute forbid

² See 23 Ill. L. Rev. 695, 696 (1929).

them to apply for habeas corpus in order to question some alleged error committed during the proceedings whereby they were found guilty and committed? They have ample opportunity to correct such errors by appeals and writs of errors and that seems to be sufficient.

K. C. S.

FURTHER AMENDMENT OF THE HABEAS CORPUS ACT

In addition to House Bill No. 746 the General Assembly also passed and the Governor approved House Bill No. 490 which repeals section thirty-two of the Habeas Corpus Act, and in lieu thereof, provides that the Civil Practice Act and the rules thereunder shall apply to any action to recover the penalties provided for in the Habeas Corpus Act.

K. C. S.

APPELLATE COURTS

Section 17 of the Illinois appellate court act (Smith-Hurd, c. 37, § 41) was amended in three respects: (1) "All opinions or decisions of said court upon *the* final hearing . . ." was changed to read, "All opinions or decisions of said court upon *a* final hearing. . . ." (2) The provision that the opinions should "be filed in the *case* in which rendered" now reads, "be filed in the *cause* in which rendered." (3) The proviso "that such opinion shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed" was eliminated.

The importance of this legislation is a matter of doubt. The elimination of the proviso eliminates a formal prohibition against the rule of *stare decisis*; but after all, in matters of this sort legal training and judicial habit are of more importance than formal requirements or prohibitions. Perhaps this legislation will serve to elevate the importance of the position in the minds of the appellate court judges and within limits this would be of value.

K. C. S.

SCALPING TICKETS

In 1907 the Illinois General Assembly passed an act which required proprietors of theatres, circuses, and public entertainments to print on admission tickets the admission price and the following: "This ticket can not be resold for more than the price printed hereon." It was made a mis-

demeanor to sell such a ticket in excess of the price received from another person for the same privilege, "or in excess of the advertised or printed rate therefor."¹ It will be observed that this legislation practically forbade a broker to make a profit. In *People v. Steele*,² this legislation was held to be unconstitutional, a violation of property and liberty guaranteed to the proprietors and the brokers in the Bill of Rights. *Burdick v. People*,³ which refused to hold unconstitutional a statute, prohibiting the sale of railroad or steamboat tickets by one not authorized to sell by the owners of the railroad or steamboat company was distinguished. In *City of Chicago v. Powers*,⁴ the *Steele* case was followed and an ordinance of Chicago with the same purpose as the law of 1907 was declared to be invalid.

In 1923, the General Assembly passed an act⁵ concerning the sale of tickets of admission to the places mentioned in the 1907 act and included baseball parks. Section one of this 1923 act is not clearly drafted, but it appears to make it unlawful for anybody in control of any theatre, etc., where admission tickets are sold, to permit the sale of such tickets at any other place than the box office, "or on the premises of such theatre," etc. Then without ending the sentence, section one qualifies the illegality by providing that such admission tickets may be placed on sale "at any other place at the same price such admission tickets are sold" at the box office or on the premises. There are words, also, which perhaps express a legislative intention to require the sale of such admission tickets "at the same advertised price or printed rate thereof." But the draftsmanship is obscure at this point and the effectiveness of the last quoted provision is questionable. Section two of the act provides a penalty for the public offense and section three provides an action of debt for the sum of twenty dollars for each ticket sold illegally. This act remained upon the books unamended until the 59th General Assembly passed House Bill No. 936. The Governor neither approved nor disapproved the bill, but filed it with the Secretary of State and thus it became a statute. It will be observed that the law of 1923⁶ did not undertake to penalize a broker in scalping tickets and one wonders whether the act has not been a dead letter.

House Bill No. 936 added a section to the law of 1923, making it unlawful

¹ Ill. L. 1907, 269.

² 231 Ill. 340, 83 N.E. 236 (1907).

³ 149 Ill. 600, 36 N.E. 948 (1894).

⁴ 231 Ill. 560, 83 N.E. 240 (1907).

⁵ Ill. L. 1923, 322.

⁶ Smith-Hurd Ill. Rev. Stat. (1930), c. 38, §§ 550 a, b, c.

to sell tickets for baseball games, football games, hockey games, theatre entertainments or any other amusement for a price more than the price printed upon the face of said ticket, and the price of said ticket shall correspond with the same price shown at the box office or the office of original distribution.

From the point of view of draftmanship, the law concerning the scalping of tickets is more obscure than ever. The new section fails to make specific mention of a circus and the old law does not mention specifically football and hockey which appear in the new section. Then it would seem that the last clause of the new section could have been improved by some such wording as this: "and the price printed on the face of said ticket shall be the same as the price displayed or charged for the ticket at the box office or the office of original distribution." It would have been still better to have redrafted the entire law of 1923 and among other things to have required the price of the ticket to be printed thereon.

The question will arise, perhaps, whether section one of the 1923 law or the new section (section 1½) will govern such as prize fights, wrestling matches, basket-ball games, bicycle contests, etc. More particularly will the new section apply to a circus? This word was specifically mentioned in the 1923 law and it can be argued that it was omitted from the new section purposely. Depending upon the interpretation of section one, it is possible that the new section (section 1½) will be held to have violated the constitutional provision against amendment by reference to the title only.⁷ It would appear that the Illinois General Assembly could have avoided some of these uncertainties, those involved in the application of the rule of *ejusdem generis*, by using language similar to that of the New York statute, dealing with the same subject, which was "theatres, places of amusement or entertainment, or other places where public exhibitions, games, contests or performances are held." It is possible that the Illinois legislation will be condemned as in violation of the constitutional provisions against unwarranted discriminations, "class legislation." Mr. Justice Holmes was fond of saying that legislation could be experimental, proceed step by step without being scientifically exact and inclusive. Condemnation of legislation as in violation of the equal protection clause was relatively rare while he was on the supreme bench, but other courts have been more dogmatic and exacting.

Beyond all of these considerations arises the question whether the new section (section 1½, House Bill No. 936) is not unconstitutional under

⁷ Ill. Const., art. 4, § 13.

People v. Steele.⁸ It is not apparent that this new section is materially different from the legislation condemned in the *Steele* case. The decision in that case has the support of a bare majority (the conservative stalwarts with their doctrinaire notions of property and liberty) of the United States Supreme Court in *Tyson and Brother v. Banton*.⁹ The New York legislation condemned there, merely prohibited a resale "at a price in excess of fifty cents in advance of the price printed on the face" of the ticket. House Bill No. 936, on the contrary, seems to prohibit a broker from making any profit. It is not possible to classify the Illinois Supreme Court as a liberal court on constitutional questions. Frequently it has been more inclined to declare legislation in violation of such conceptions as liberty and property than the national Supreme Court. Accordingly, the outlook for House Bill No. 936 is a dark one, despite *People ex rel. v. Thompson*.¹⁰ There the court, Dunn, J., dissenting, refused to invalidate an ordinance which required a theatre ticket to have the price of admission printed thereon and forbade a licensee of a theatre in selling such ticket to receive any consideration in excess of the designated price or to enter into any arrangement for the receipt of such a consideration.

K. C. S.

FILLED MILK

In 1923 the Illinois General Assembly passed section 19 $\frac{1}{2}$ of chapter 56 $\frac{1}{2}$ (Smith-Hurd, 19a). The last General Assembly repealed this section and enacted sections 19 a, b, and c in lieu thereof. These provisions were contained in House Bill No. 730 which, though not approved by the Governor, was filed by him on July 10, 1935.

Section 19 $\frac{1}{2}$, Laws of 1923, p. 406

"No person shall manufacture, sell or exchange, or have in possession with intent to sell or exchange, any milk, cream, skim milk, buttermilk, condensed or evaporated milk, powdered milk, condensed skim milk, or any of the fluid derivatives of any of them to which has been added any fat or oil other than milk fat,

Section 19 a,b,c, Laws of 1935, p. 886

19a. "The term 'filled milk' means any milk, cream or skimmed milk, whether or not condensed, evaporated, concentrated or desiccated, or any of the fluid derivatives of any of them, to which has been added any fat or oil other than milk fat. This definition shall not include any milk from which no part of the milk

⁸ *Supra* note 2.

⁹ 273 U.S. 418 (1927), criticized in 40 Harv. L. Rev. 1009 (1927), 22 Ill. L. Rev. 192 (1927), 25 Mich. L. Rev. 880 (1927), and 36 Yale L. J. 985 (1927).

¹⁰ 283 Ill. 87, 119 N.E. 41 (1918).

either under the name of said products or articles or the derivatives thereof or under any fictitious or trade name whatsoever."

fat has been extracted, whether or not condensed, evaporated, concentrated or desiccated, to which has been added any substance rich in vitamins, nor any distinctive proprietary food compound not readily mistaken for milk or cream or for evaporated, condensed, concentrated or desiccated milk or cream, provided such compound (1) is prepared and designed for the feeding of infants or young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half (16½) ounces of the article, bearing a label in bold type that the contents are to be used only for said purpose.

19b. " 'Filled milk' as herein defined, is an adulterated food and its sale constitutes a fraud upon the public.

19c. "It shall be unlawful for any person, by himself, his servant or agent, or as the servant or agent of another, to manufacture for sale within this State or sell or exchange, or have in his possession with intent to sell or exchange, any 'filled milk,' as defined in this Act."

It will be observed that section 19½, laws of 1923, provided in very general language against the making or selling, etc., of any of a variety of milks "to which has been added any fat or oil other than milk fat." This section was tested and declared unconstitutional in *People v. Carolene Products Co.*¹ The opinion was based on the stipulated facts that "Carolene was composed of evaporated skimmed milk to which was added cocoanut oil" and that neither the ingredients "nor the combination was harmful or deleterious to the health in any way." It was not doubted that the statute was violated, but it was held that the statute as applied to Carolene was contrary to due process, i.e., it was "arbitrary and unreasonable." It was also stipulated that the use of cocoanut oil in oleomargarine was not prohibited by the laws of Illinois. This was made the basis of another holding, apparently, that section 19½ was in violation of the concept of equal protection. Observe this language:

¹ 345 Ill. 166, 177 N.E. 698 (1931), reviewed and mildly criticized in 27 Ill. L. Rev. 444 (1932), and 30 Mich. L. Rev. 790 (1932).

It is unreasonable to permit cocoanut oil to be freely used as the principal ingredient of oleomargarine by one manufacturer and prohibit its use in smaller proportions by another manufacturer of a food product admitted to be equally wholesome and healthful.²

The Supreme Court of Illinois in the *Carolene* case was careful to set out part of the label on the cans in which Carolene was sold. This label stated that Carolene was "a compound of refined nut oils and evaporated skimmed milk" which was "not to be sold for evaporated milk" even though it was "especially prepared for use in coffee, baking, and for other culinary purposes." This was the basis for the court's assertion that no question of imitation, fraud, or deceit was involved in the case.

It will be observed that the product which was "filled milk" by statutory definition was not sold under the name of milk. Thus is eliminated the effect of the ruling in *Hutchinson Ice Cream Co. v. Iowa*,³ which sustained statutes which prohibited the sale of a substance under the name of "ice cream" when the substance contained less than a specified amount of butter fat.

A case that arose in Massachusetts is of greater significance. An injunction was granted to prevent health officers from enforcing the Massachusetts "filled milk" law against the sale of Carolene; but this particular Carolene was a compound of skimmed milk and egg yolk. No nut or vegetable oils were used, but about two per cent of the compound consisted of fats and about a fourth of this was derived from the egg yolks. The district court was unwilling to give a literal interpretation to the statute, similar to the 1923 Illinois statute. A literal interpretation would have condemned the sale of the ordinary chocolate milk shake, to say nothing of ice cream and many kinds of cake.⁴ The Circuit Court of Appeals took a similar view of the statute saying that it did not "proscribe the addition of egg yolk, but of fat or oil, as such, other than milk fat. Egg yolk is not a fat or oil, even though it may contain some fat."⁵ A statement, however, by Judge Anderson sitting in the district court, is of interest as showing a point of view radically different from that assumed by the Supreme Court of Illinois on the question of fraud.

Such milk products (milk from which milk fats have been largely or entirely taken, and vegetable fats or oils, usually cocoanut oil, substituted) with their diminished nu-

² 345 Ill. 166, 171, 177 N.E. 698, 700 (1931).

³ 242 U.S. 153, 37 Sup. Ct. 28 (1916).

⁴ *Carolene Products Co. v. Mahoney*, 294 Fed. 902 (D.C. Mass. 1923).

⁵ *Mahoney v. Carolene Products Co.*, 2 F. (2d) 366 (C.C.A. 1924).

trient values and cheapened cost, have come to be regarded as either injurious to health or as involving elements of fraud upon those who desire and think they are getting real milk, or both.⁶

An Ohio statute forbade the sale, etc., of "condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed" and unless it contained a specified proportion of milk solids. The plaintiff, Hebe Co., sold a product known as Hebe which consisted of evaporated skimmed milk blended with six per cent of cocoanut oil. It sought to prevent prosecutions under the Ohio statute, alleging, among other things, that it violated the Fourteenth Amendment. This argument was rejected and the injunction was refused even though it was not questioned that Hebe was a wholesome food and that the label on the can containing the product admittedly told the truth. But the Supreme Court of the United States, through Mr. Justice Holmes, argued that in many cases the consumer never sees the label and:

Moreover when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort.⁷

Accordingly the court refused to invalidate as arbitrary the statute, the purpose of which was "to secure the presence of the nutritious elements mentioned in the act, and to save the public from the fraudulent substitution of an inferior product that would be hard to detect."⁸ This decision of the national Supreme Court was cited by the Illinois Supreme Court, but the opinion of Mr. Justice Orr gives it only a superficial and unsatisfactory consideration. Apparently this merely represents the difference of attitude of the two courts on the meaning of *due process*. The attitude of the United States Supreme Court is usually liberal and tolerant of legislative opinion, while that of the Illinois Supreme Court is generally conservative and frequently censorious. The prairies of Illinois do not seem to spawn liberal judges in significant numbers and it appears to make no difference that they mount the bench as a part of the New Deal.

In 1922 the Wisconsin Supreme Court, with Rosenberry, J., specially concurring in the judgment and with Eschweiler, J., dissenting, followed the lead of the national Supreme Court and held valid a Wisconsin statute forbidding "filled milk" in practically the same language as the Illinois

⁶ 294 Fed. 902, 903 (D.C. Mass. 1923).

⁷ Hebe Co. v. Shaw, 248 U.S. 297, 39 Sup. Ct. 125 (1919).

⁸ Hebe Co. v. Shaw, *supra* note 7.

law of 1923.⁹ The product involved was the same "Hebe" that was considered by the United States Supreme Court and the essence of the Wisconsin opinion seems to be this:

As there is no corresponding provision in our state constitution that goes so far as to sustain the rights of property as the Fourteenth Amendment of the federal constitution, that decision is decisive of the case here if it is followed. While this court has the right to differ from the supreme court of the United States on this question, it will not do so on the construction of the federal constitution.¹⁰

Then the Wisconsin court concluded that Hebe was "conducive to fraud and deception and likely to be injurious to the public health."¹¹ This conclusion was based on the following facts set forth in the opinion: (1) Hebe had been advertised extensively as a milk or compound of milk and had been sold by retailers as milk or evaporated milk; (2) similar advertising and selling of similar compounds had occurred; (3) some retailers had sold Hebe at the same price as the genuine evaporated milk, even though purchased at a cheaper price; (4) Hebe is similar in taste, odor, appearance, consistency and manner of packing to evaporated milk; (5) Hebe is not deleterious in itself, but it lacks vitamin A, an essential element of a proper dietary; and (6) while this vitamin can be supplied by other foods, it was admitted that Hebe was not a proper substitute for genuine evaporated milk for infants. The label on Hebe warned: "Do not use in place of milk for infants."

The Illinois Supreme Court stated that the view presented in the opinion in the preceding case was incompatible with a view later expressed by the same Wisconsin court. The reference was to *John F. Jelke Co. v. Emery*,¹² which held unconstitutional a statute making it unlawful to sell, etc., any product which "may be used as a substitute for butter and which is made by combining with milk or milk fats or any of the derivatives of either any fat, oil or oleaginous substance or compound thereof other than milk fat." The opinion was based upon the following facts: (1) while oleomargarine did not possess all of the healthful properties of butter and was not in all respects a substitute for butter, still it was a nutritious and wholesome food containing no unhealthful ingredients; (2) oleomargarine was not sold as a substitute for butter but on its own merits and under such circumstances that every purchaser or user was fully advised of what he was buying or using. This eliminated the element of fraud as a justifi-

⁹ See *State ex rel. v. Emery*, 178 Wis. 147, 189 N.W. 564 (1922).

¹⁰ 178 Wis. 147, 158, 189 N.W. 564, 569 (1922).

¹¹ 178 Wis. 147, 160, 189 N.W. 564, 569, 570 (1922).

¹² 193 Wis. 311, 214 N.W. 369 (1927), reviewed in 12 Minn. L. Rev. 75 (1927).

cation for the statute. Curiously enough, Judge Rosenberry, who wrote the opinion, made no mention of the previous decision concerning "filled milk." On the basis of the facts shown there is a clear distinction as to the element of fraud. While oleomargarine has milk as one ingredient, still it may be skimmed milk and presumably the product is deficient in vitamin A as is "filled milk," such as Hebe. But oleomargarine appears to have come of age and into a respectability of its own. It is known for what it is and the public is no longer alarmed or deceived. It is, perhaps, the poor or the thrifty person's "butter," but the court apparently saw no reason to prohibit such a product in order to assist the dairy interests, even in Wisconsin, in their competition with animal or vegetable fats. It would not be easy to justify a prohibition on "filled milk" on the same sort of facts. If the advertising and the salesmanship of such products as Hebe and Carolene is found to be as honest as that of oleomargarine in Wisconsin, it does not seem that equal protection would be afforded by forbidding "filled milk" and permitting oleomargarine. Both are substitutes for more expensive foods and neither is a perfect food, if indeed there is anything that will qualify as such. Perhaps, then, one can agree with the result of the Illinois decision *on its own particular assumptions* of no health problem and no fraud and an apparent discrimination in favor of oleomargarine. In any event, the opinions show how important results turn upon the difference in the facts. It would appear as if the prosecution in the Illinois case failed to develop all that can be said against the sale or manufacture of Carolene. On the other hand if a prosecution is started under the new 1935 law, the defense apparently will miss a good opportunity if it does not emphasize what may be the "low down" truth that there has been a good deal of pretense about "health" and "fraud." The real contest seems to be between the dairy interests and the vegetable or nut oil interests. If this be the case, there seems to be no constitutional justification in favoring one over the other.

In view of all that has been written, it will require considerable optimism to regard the 1935 legislation on "filled milk" as constitutional in Illinois. The prohibitory part of the new section (19a) seems to be essentially the same as that of the section repealed (19 $\frac{1}{2}$). But 19a creates two exceptions to its prohibition. By the first exception is eliminated milk from which no milk fat has been extracted and to which has been added "any substance rich in vitamins." This seems unnecessarily indefinite in the amount of the substance, in the meaning of "rich," and in failing to designate which vitamins are meant. If any vitamin in a small amount of any substance is sufficient, then perhaps the *practical* meaning is that

"filled milk" does not include any compound in which the milk content is whole milk. At least the general understanding seems to be that vitamins are found in most foods in their natural state. Salt, other minerals, and cane sugar are understood to be examples of substances without vitamins. Yet this interpretation comes close to conflicting, perhaps it does conflict, with the first sentence in section 19a which defines "filled milk" as "any milk," etc., to which has been added "any fat or oil other than milk fat." To be so indefinite and uncertain is to invite doubt as to constitutionality. The second exception concerning "any distinctive proprietary food compound," etc., seems to be specialized to the degree that it suggests the danger of an attack for improper discrimination, i.e., lack of equal protection. But here, as elsewhere in the problem, the facts presented in any particular contest should be vastly important.

Section 19b of the law of 1935 specifies that "filled milk" is an adulterated food, but this does not seem to be important in view of the broad definition of adulteration in section 8 of chapter 56 $\frac{1}{2}$ (Smith-Hurd). Section 19b also provides that the "sale" of "filled milk" "constitutes a fraud upon the public." But the mere declaration of fraud is not binding on courts. It perhaps indicates the argument that will be used to sustain the new legislation. It is noticeable that it was not declared that the manufacture for sale or the possession with intent to sell was a fraud upon the public. However, section 19c makes it unlawful to manufacture for sale, sell, exchange, or possess with intent to sell or exchange any "filled milk" "as defined in this act." Apparently there will be an advantage in prosecuting for a "sale" of "filled milk" when the dairy interests select their test case.

K. C. S.

PRACTICE AND PROCEDURE IN SPECIAL ACTIONS AMENDED TO CONFORM WITH THE CIVIL PRACTICE ACT

The Civil Practice Act, passed in 1933, was incomplete as a code covering pleading and practice in Illinois, in two major respects. First, the act expressly excluded ten named actions,¹ and also "other actions in which the procedure is regulated by special statutes." Second, literally hundreds of sections in the statute books, dealing with substantive law or procedure, contained provisions or language not completely in harmony with the substance or vocabulary of the new act. Ten days before the new pleading

¹ Section 1 enumerates: attachment, ejectment, eminent domain, forcible entry and detainer, garnishment, habeas corpus, mandamus, *ne exeat*, *quo warranto*, and *replevin*. Sec. 31, par. 2 repeats the exceptions contained in section 1.

was to come into use, the Supreme Court adopted new rules² which patched up the first defect by providing that

the separate statutes shall control, to the extent to which they regulate procedure in such actions, but the Civil Practice Act shall apply to matters of procedure not so regulated by separate statutes.

This was obviously merely a make-shift, imperfectly filling the first gap³ and leaving the second untouched.

The Committee on the Civil Practice Act of the Illinois State Bar Association⁴ assumed the task of coordinating all the statutes with the new Civil Practice Act. The labors of the members of this committee culminated in ninety-nine bills, each amending a different act. These bills were introduced by Representative Adamowski on March 5, 1935, and were numbered House Bills 432 to 530 inclusive. One of these bills failed of passage because of disagreement between the house and senate over amendments.⁵ The other ninety-eight were passed by both houses, in most cases exactly as originally drafted. Six were vetoed by the governor, apparently with the approval of the committee, because of errors discovered in them after they had been passed.⁶ It is planned to prepare substitutes for these bills which failed to become laws, and it is hoped to secure their adoption at a special session of the present legislature, or at the next regular session.

The bulk of these amendatory acts can be summarized briefly, with a few illustrations. Special mention will then be given the acts which seem to deserve it because of the importance of the changes made.

Most of the amendments might be classed as mere changes in termi-

² Section 2 of the Civil Practice Act gives the court rule making powers considered broad enough to cover the actions regulated by special statutes.

³ The expression "regulate procedure" is not easy to apply. For instance, a statute often creates a cause of action for damages or a penalty and provides for its recovery "in an action of debt" (e.g., Smith-Hurd Ill. Rev. St. 1933, c. 38, § 550c). Or a statute provides: "Notice to all parties interested shall be given as now authorized in cases in chancery" (e.g., Smith-Hurd Ill. Rev. St. 1933, c. 6, § 2). Are these matters of procedure "regulated by separate statute" to such an extent that the Civil Practice Act should not control under this rule?

⁴ Harry N. Gottlieb is chairman of this committee. Albert E. Jenner, Jr., an associate editor of Illinois Civil Practice Act Annotated, is a member and was active in the preliminary work of preparing materials for the committee. Mr. Jenner's explanatory luncheon talks before the Chicago Bar Association, supplemented by some additional suggestions, aided materially in the preparation of this report on these acts.

⁵ H.B. 441 amending the Administration of Estates Act.

⁶ H.B. 466 amending the Municipal Court of Chicago Act; H.B. 473 amending the gasoline and volatile oils act; H.B. 477 amending the bail (criminal cases) act; H.B. 494 amending the nonresident corporations tax act; H.B. 495 amending the reciprocal or interinsurance act; and H.B. 518 amending the railroad act concerning grain in bulk.

nology, some statutes requiring many such changes, while sixteen required the alteration of only one word or one phrase. In some cases the old statute had merely mentioned a pleading or step in the procedure, such as "bill" or "demurrer," and the vocabulary of the Civil Practice Act was adopted (i.e., "complaint" and "motion"). In these cases the amendment made little if any change in procedural or substantive law. But in some of the statutes receiving a change in terminology, the statute had adopted some old common law or equity procedural step. Here the amending act in effect, and often in express wording, changes the procedure to agree with that under the Civil Practice Act.

In addition to these changes in terminology which actually changed the procedure to conform to the new practice act, occasionally a section was added which adopted the provisions of the Civil Practice Act *in toto* for the statutory remedy, at least in all respects except as otherwise expressly provided. In other sections the Civil Practice Act is made to govern in some one named respect, as in the venue, or in the service of summons, or in the pleading, or in the appeal. In general, care was taken to make it clear that future changes in the Civil Practice Act or rules of court thereunder should apply to the particular statutory remedy also. This is further clarified by a new rule of statutory construction.⁷

While conformity is now the rule, the unusual feature requiring a special statute often calls for one or more peculiarities in the procedure. Many exceptions heretofore existing were desirable and were therefore retained. The mere mention of a few will be sufficient proof of the need of some of the variations. In an ordinary action, the summons is made returnable on a return day not less than twenty nor more than sixty days after the date of the summons.⁸ Such a provision would not be adopted for special proceedings such as habeas corpus, nor for "summary proceedings." The provision, "not less than five days nor more than ten days," is retained for suits to enjoin the disbursement of public moneys by officers of the state.⁹ Similar variations should occur in the time limits for filing notice of appeal. The liberal rules allowing joinder of any number of similar or dissimilar causes of action between the same parties should not be applied to ejectment proceedings,¹⁰ forcible entry and detainer,¹¹ gar-

⁷ H.B. 527, Ill. L. 1935, 1430: "Twenty-second—The terms 'other civil cases' and 'ordinary civil cases' or any other equivalent expression, when used with reference to practice, procedure, or appeal, shall be deemed to refer to cases under the Civil Practice Act, and all existing and future amendments thereto and modifications thereof, and all rules now or hereafter adopted pursuant thereto."

⁸ Ill. Sup. Ct. Rules 1933, rule 4 (355 Ill. 14).

⁹ H.B. 508, Ill. L. 1935, 1010.

¹⁰ H.B. 433, Ill. L. 1935, 787.

¹¹ H.B. 434, Ill. L. 1935, 892.

nishment,¹² and several other special types of proceedings. Counterclaims in such actions are also limited to matters "germane to the distinctive purpose of the action." In fact, when dealing with an action governed by a special statute, it is still necessary to examine the statute for special rules of pleading or practice.

The approval here expressed of these variations from the Civil Practice Act should not be taken as an approval of all variations that were left by the committee in this revision. There are several cases where reasonable men might disagree as to the desirability of retaining distinctions.¹³ The committee might properly have withheld controversial amendments in order not to endanger the whole set of amendments. But there are other cases where retained distinctions can hardly be justified. Thus Section 13 of the Civil Practice Act permits service of summons by leaving a copy with the defendant personally, "or (2) by leaving such copy at his usual place of abode, with some person of the family, of the age of ten years or upwards, and informing such person of the contents thereof, provided that the officer making such service shall send a copy . . . (by mail)." Perhaps it is sufficient to give a defaulting tenant notice to quit by leaving a copy of the notice "with some person above the age of ten years, residing on or in possession of the premises"; it is interesting that the amending act¹⁴ changed the age of the child from "above the age of twelve years" apparently with the object of conforming with the Civil Practice Act. Yet this statute still differs with the Civil Practice Act in some details, both of wording and of substance. If the tenant fails to leave, the summons in the ensuing forcible entry and detainer suit shall be served as prescribed in the Civil Practice Act if suit is brought in a court of record; but if brought before a justice of the peace, service of summons may be made "by leaving such copy at his usual place of abode with some person of the family of the age of twelve (12) years or upwards, and informing such person of the contents thereof."¹⁵ Such variations, in age and in other details, seem unnecessarily confusing. Even in actions before justices of the peace, a justification should be demanded of each retained exception to conformity. Less detail in the pleading before the justice of the peace is desirable, but that does not justify an attitude of

¹² H.B. 435, Ill. L. 1935, 900.

¹³ Is the general issue (in effect) retained in ejectment (H.B. 433, Ill. L. 1935, 788) and forcible entry and detainer (H.B. 434, Ill. L. 1935, 892) because an unusual need for it exists in these actions, or is this the beginning of an effort to get rid of the requirements of specific pleading?

¹⁴ H.B. 499, Ill. L. 1935, 940.

¹⁵ H.B. 434, Ill. L. 1935, 892.

laissez faire toward every peculiarity prescribed at present for an action though habitually brought in the justice's court.

One more specific case, involving three statutes, will suffice to show the need of continued study and improvement of statutes incidentally governing practice and procedure in special actions. This case will also illustrate the natural conservatism of all revising committees which keeps many antiquated provisions in our statutes.

At common law, distraint (also called distress) for rent was not a judicial proceeding. The legality of the distraint was tested in court when the tenant brought replevin. The landlord was required to assume certain burdens which were indicated by the procedure he used to set up his rights under the distraint: he filed a sort of cross-action called an avowry. This procedure was used in the early days in Illinois. The Revised Statutes of 1827 reenact regulatory sections under three different chapters: (1) under Landlord and Tenant, the right to distraint for rent is preserved with some modifications from the common law; (2) under Replevin, the landlord (defendant) is permitted "to avow or make cognizance generally without particularly setting forth the tenure or title to the lands whereon such distress was taken"; (3) under Costs, the successful defendant "making avowry, justification or cognizance in replevin" is allowed his costs against the plaintiff. In 1841 the entire procedure was changed; the distraint itself is made a judicial proceeding, with the party distraining required to bring the tenant into court by summons and "prove his demand as in other cases."¹⁶ This effectively abolishes the old procedure of an avowry to an action of replevin: if the distraint is properly prosecuted, the defense of *res adjudicata* will lie to any action of replevin brought by the tenant; if not properly prosecuted, an avowry would fail.¹⁷ The provision in the Replevin Act, which specifically applies only to an avowry of distraint for rent, has been a "dead letter" since that statute of 1841, yet it and also the provision in the Costs Act are still retained in our revised statutes.

The action of the committee in dealing with these provisions is as yet inadequate. The section in the Replevin Act, though dealing with a proceeding made obsolete almost a century ago, was retained with the word "allege" substituted for "avow or make cognizance."¹⁸ The act amending the Costs Act¹⁹ does not affect the section here mentioned, so this section

¹⁶ Ill. L. 1840-41, 171, 172.

¹⁷ It is true that the old procedure was used in 1873 in *Lindley v. Miller*, 67 Ill. 244, but the tenant and the court overlooked the fact that the distraint had not been legally carried out.

¹⁸ H.B. 439; Ill. L. 1935, 1139 (amended § 19).

¹⁹ H.B. 461; Ill. L. 1935, 627.

is retained even with the words "avowry" and "cognizance." The sections on distraint in the Landlord and Tenant Act received slight attention²⁰ in comparison with that given the related problem of attachment.

The mention of these cases indicating the need of further study in this field is not intended as a criticism of the work of the present committee. Because of the short time available for it and the legislature, its program contemplated immediate action on the many rather obvious and non-controversial amendments, with a careful revision of only a few of the more important acts. The committee deserves high praise for its success in carrying out that program.

Attachments

The act in regard to attachments in courts of record received very careful attention and was to some extent reorganized and in many respects amended.²¹ All of the new provisions seem clear, and it is not necessary to emphasize the importance of studying the appropriate sections before proceeding under the amended act. The amended act conforms with the Civil Practice Act as far as possible. The procedure in tort cases agrees more closely with that in contract than it did under old section 31. A clearer provision is made for service by publication in a garnishment attachment against a nonresident debtor. The exception, relieving the plaintiff of giving bond when the defendant is a non-resident, is repealed. The general attachment, with bond "double the sum sworn to be due," is retained; there are, in addition, provisions for an attachment of specific property, with bond "double the value of the property to be attached." There are also better provisions for alias and pluries writs, amply covering a combination of a specific and a general attachment. The distinction between the writ as an attachment writ and as a writ of summons is clarified, with the attachment writ executed by the sheriff of the county while the summons may be served as provided in the Civil Practice Act. The whole act is very carefully drawn.

Ejectment

Many amendments were required in order to make the Ejectment Act conform to the Civil Practice Act as nearly as seemed desirable. This revision was carefully carried out.²² The most important change was in

²⁰ H.B. 499; Ill. L. 1935, 940. The word "declaration" was three times changed to "complaint," and the words "set off" were changed twice, once to "counterclaim" and once to "counterclaim as in other civil actions."

²¹ H.B. 432; Ill. L. 1935, 210. In connection with § 39 (a), see H.B. 446, Ill. L. 1935, 210.

²² H.B. 433; Ill. L. 1935, 786.

eliminating the historical anomaly of giving each party more than one opportunity to prove his title.

Forcible entry and detainer

The action of forcible entry and detainer is almost always brought in the Municipal Court of Chicago, or, outside Chicago, in a Justice of the Peace Court. Many amendments were made in a careful revision of the act, but little effort was made to have the procedure (except when in a court of record) conform with the Civil Practice Act.²³ The simplicity of the old procedure is retained.

Replevin

Many of the sections of the Replevin Act were amended and the whole act was overhauled.²⁴ A distinction, similar to that in the Attachment Act, is made between the service of the writ whereby the property is taken (by the sheriff of the county if in a court of record) and the service of the writ as summons (as in other cases under the Civil Practice Act). When the writ is issued by a justice of the peace, sections 6 and 7 appear to be in conflict as to whether the same distinction is made.

The Replevin Act formerly did not contain any provision for a statutory appeal. While such an appeal was often used without objection, it would seem that only the common law methods of obtaining appellate review were available. The new act specifically provides for appeal as in other cases. But the form of this addition raises a question as to its validity. The committee decided that old section 21 was not necessary. Instead of repealing that section and adding the new section on appeal, section 21 was "amended" by substituting the new section for the old, and the change is described in the title (of the amending act) merely as an amendment of section 21. This same practice was used in several of these bills, but this case seems to be the only one of doubtful validity under the decisions on article 4, section 13 of the Illinois Constitution wherein the subject of each bill is required to be stated in the title. Here it might be held that, while this section creating the statutory appeal is germane to the Replevin Act, it is not germane either to section 21 or to any other section of that act mentioned in the new act.²⁵

²³ H.B. 434; Ill. L. 1935, 891.

²⁴ H.B. 439; Ill. L. 1935, 1137.

²⁵ See *Dolese v. Pierce*, 124 Ill. 140, 16 N.E. 218 (1888), as limited by *Proviso High School v. Oak Park District*, 322 Ill. 217, 153 N.E. 369 (1926).

Account

The common law action of account was abolished.²⁶ This really does not change the substantive law, as this remedy has seldom been used in recent years. Assumpsit has been available for simple cases, and the complicated cases have been brought in equity. To make sure that the repeal of this remedy did not affect the substantive rights to an accounting between joint tenants or tenants in common in real estate, a new section specifically providing for this right is added to "an act to revise the law in relation to joint rights and obligations."²⁷ Again the query is raised: is the provision regarding tenants in common germane to the title?

Appeals from the appellate courts

In addition to these acts amending statutes governing special remedies, special mention should be made of the act amending the section of the Appellate Courts Act which governs appeals from that court to the Supreme Court.²⁸ Much of the jurisdiction of the Supreme Court is constitutional, but many important cases are appealed under this section. The bulk of the section has been entirely rewritten, with changes in substance as well as in form. While perhaps the amended rules will not cause the Supreme Court to review different cases than would have been reviewed under the old provisions, the new rules appear to be considerably better suited for making a selection of cases for consideration by the highest tribunal.

W. L. E.

APPEALS FROM PROBATE COURT

When a claim filed against an estate is contested by the administrator or executor, appeal may be taken from the ruling in the probate court, and a trial *de novo* is had in the circuit court. The statute formerly required the appellant to furnish "a good and sufficient bond."¹ If the claim was rejected by the probate court, this provision required a bond merely for costs. But if the claim was allowed, this required the administrator to file a bond twice the amount allowed.² This harsh requirement was changed by the last session of the legislature.³ The administrator need file a bond "for costs only."

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²⁶ H.B. 440; Ill. L. 1935, 1.

²⁷ H.B. 496; Ill. L. 1935, 936.

²⁸ H.B. 470; Ill. L. 1935, 695.

¹ Smith-Hurd Ill. Rev. Stat. 1933, c. 3, § 69.

² Pence v. Pettett, 211 Ill. App. 588 (1918).

³ H.B. 91; Ill. L. 1935, 1.

VENUE FOR ACTION ON A JUDGMENT NOTE

During the present series of sharp conflicts and major battles between the "Freedom of Contract" conservatives and the "Protection from Exploitation" liberal forces, perhaps little attention should be paid to this recent slight skirmish. If mentioned at all in the war bulletins, it would have received merely the slight notice that the "money lenders" division of the conservatives "were driven out of an untenable position," or (from their own reports) "retired from an advanced position for the purpose of strengthening their lines." The incident is here recorded, not because of any great economic importance of the encounter, but because of the possible legal disputes that may arise over the extent of the ground gained and the action to be taken in its protection.

The chief advantage of the power to confess judgment, most commonly found in the "judgment note," lies in the lack of delay in obtaining a judgment, with the resulting priority in the lien on real property and the speed in obtaining execution on personal property.¹ There are two further advantages of considerable value: (a) the attorney confessing judgment can waive many if not all waivable defects in the proceedings, apparently including venue requirements²; and (b) the defendant is burdened with the duty of taking the affirmative steps by motion to have the judgment vacated, and this motion is granted only when the defendant discloses equitable reasons for setting aside the judgment.³

The power to confess judgment was slightly restricted by the recent act which provides that the application to confess judgment can be made only "in the county in which the note or obligation was executed or in the county where one or more of the defendants reside."⁴

The object of this amendment is quite laudable. The obligor might be unfairly prejudiced by a judgment of which he has no notice. While a provision requiring notice to be given, as by summons, within a short time after obtaining judgment would be a more direct way of reaching this object, the adopted requirement would usually result in the obligor's learning

¹ The possible speed in obtaining judgment is even greater than the clearly intended gain in reducing the delay in court procedure. The holder is permitted, under the common wording of the judgment provision, to have judgment confessed even before the note is due. *Handley v. Mobury*, 266 Ill. App. 356 (1932). It thereby operates as an unconditional power to accelerate the date of payment, without any loss in the negotiable character of the note. Uniform Negotiable Instruments Act, § 5; Smith-Hurd Ill. Rev. Stat. 1935, c. 98, § 25.

² For a discussion of the effect of the release of errors by the *cognovit*, see *First Nat. Bank of New Paris v. Royer*, 273 Ill. App. 158 (1933). An error in venue can generally be reached only by plea in abatement, and can be waived.

³ *Packer v. Roberts*, 140 Ill. 9, 29 N.E. 668 (1891).

⁴ H.B. 397; Ill. L. 1935, 1072.

of the judgment so that he might early file a motion to vacate the judgment. At first glance it would seem that the limitation is innocent enough and would seldom seriously embarrass the holder of the obligation, though the dearth of reported cases raising objections to errors in venue in confession of judgment cases might indicate that there is little need for this provision.

The difficulty with the provision lies in the method of enforcement. Similar requirements for venue already exist,⁵ but apparently might be waived by the *cognovit*. To prevent such a waiver, the amending act provides: "A judgment entered by any court in any county other than those herein specified shall have no force or validity, anything in the power to confess to the contrary notwithstanding." This provision raises many problems of interpretation which must await the decision of the appellate courts. The language of the statute may be extreme enough to make this venue requirement jurisdictional.⁶ Perhaps a judgment in the wrong county would be void, with a sale on execution subject to collateral attack.⁷ Perhaps the record would be defective if it failed to show the basis for venue, at least when the judgment by default is obtained in vacation. If jurisdictional, the recital of facts constituting jurisdiction might not be binding, even against collateral attack.⁸ Such rulings would cast doubt on the validity of any judgment by confession and would adversely affect the bidding at the execution sale, and the marketability of the title obtained at the sale. This in turn would seriously prejudice the value of the confession of judgment provision in a note.

While no prediction is here made as to the interpretation that will be given to this act, the possible adverse effect on all judgments by confession, even when actually in the correct venue, may be serious enough to suggest that the bill might have received more opposition had this indirect effect been considered.

W. L. E.

⁵ Ill. Civil Practice Act, § 7 (Cahill's Ill. Rev. Stat. 1935, c. 110, § 135), lays venue generally "in the county where one or more defendants reside or in which the transaction or some part thereof occurred out of which the cause of action arose. . . ."

⁶ Compare: *Baltimore & O. R. R. v. Hollenberger*, 76 Ohio St. 177, 81 N.E. 184 (1907); *Central Me. Power Co. v. Me. Cent. R.R. Co.*, 113 Me. 103, 93 Atl. 41 (1915).

⁷ Compare: *Hutson v. Wood*, 263 Ill. 376, 105 N.E. 343 (1914).

⁸ The courts may require a direct attack, by motion similar to the common law writ of error *coram nobis*. See: Ill. Civil Practice Act, § 72; Smith-Hurd Ill. Rev. Stat. 1935, c. 110, § 200.